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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-549 / 89-1446

220

JESSIE DANIEL MASTERSON,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Masterson sought postconviction relief to challenge his 1982 convictions for first-degree murder and for two other crimes arising from the same facts. The district court denied postconviction relief, and Masterson has appealed. **AFFIRMED.**

Helen L. Stirling, Albuquerque, New Mexico, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, Denver D. Dillard, County Attorney, and Scott Peterson, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, J.

PER CURIAM

Jessie Daniel Masterson, applicant-appellant, appeals the trial court's denial of his application for postconviction relief. Appellant was convicted of murder in the first degree, assault, and false imprisonment, by a Linn County jury on January 21, 1982. The conviction for murder was affirmed in an unpublished per curiam opinion by our supreme court. Application for postconviction relief was filed June 30, 1987, and denied August 30, 1989. Appellant contends his trial counsel was ineffective in a number of particulars. We affirm.

Appellant was accused of murdering Donald Schmidt. Schmidt was living with Susan Strickler in a duplex in Cedar Rapids. There were facts from which the jury could have found that at about 11:00 p.m. on July 7, 1981, Schmidt took appellant to Strickler's apartment. Appellant fell asleep and Schmidt and Strickler went to bed. Schmidt got up at about 12:30 a.m. and he and defendant began to drink beer.

Strickler awoke and joined the two men. Appellant believed Strickler had overheard appellant telling of his plan to kill his ex-wife at 6:00 that morning, kidnap his children, and go to Texas. Appellant went to get a gun from the car. He also had a second gun under the couch in the duplex. Appellant became upset and threatened to kill Strickler and/or Schmidt, because they knew too much about

his plan. Schmidt suggested appellant simply tie up one or both of them so that his plan would not be revealed.

At about 2:00 a.m. appellant forced Strickler to bind Schmidt's hands and feet. Appellant then forced Schmidt to inch into the bedroom and he pushed Schmidt onto the bed. Appellant took Strickler to the living room and drank some vodka. Appellant found a butcher knife, threatened Strickler and cut her repeatedly on her breasts, stomach, legs and chest. He also cut off the nightgown she was wearing.

Appellant took Strickler to the bedroom to show Schmidt what he had done to her. Appellant put Schmidt into a closet in the bedroom. He put a noose made from an electrical cord around Schmidt's neck. He told Schmidt he would make sure Schmidt did not get away. He pushed the bed in front of the door.

Appellant took Strickler back into the living room, threatened her life and threatened to commit a sex act upon her. Appellant and Strickler heard a loud noise in the bedroom. Appellant ran down the hall with a knife yelling "You set me up." Appellant met Schmidt in the hallway and Strickler saw Masterson stab Schmidt.

Schmidt stumbled out the front door and up the street, bleeding. Appellant grabbed a rifle and directed Strickler to drive him away in her car.

Appellant directed Strickler where to drive and at one point shot out the window on the driver's side of the car because she was driving too slowly. Appellant directed Strickler to stop in an alley, where she said he forced her to perform two sex acts.

He also directed Strickler to open the back door at the house where his ex-wife was staying. When appellant entered the house with his rifle, Strickler ran away. Appellant was subdued by his ex-wife, son and a friend. The police arrived shortly thereafter. Appellant was taken to the police station, questioned, and jailed. At noon on July 8, 1981, records reported he was suffering severe alcohol withdrawal symptoms. He was held in the Linn County Jail and Oakdale until his trial started on January 12, 1982.

When arrested, appellant had a laceration approximately three-quarters of an inch long and one-third to one-half inch deep; it was bleeding and required stitches. He reported to the jail's nurse his left ear was ringing, he had been drinking for at least five days nonstop, and he had not eaten since he left the Veteran's Administration Hospital five or six days before. His breath smelled of alcohol, his blood pressure was elevated, and the nurse had to orient him several times as to the date and time of day. Appellant was shaky, unsteady on his feet, and had three superficial scrapes on his right hand. According to

the nurse, appellant had memory loss which she unsuccessfully tried to relate either to the head wound or to the drinking. He was also unable to provide her with a complete history of the medications he had been taking at the Veteran's Administration Hospital.

The nurse called for a doctor to come, who administered five stitches without the need for any anesthetic. The nurse said she was familiar with alcohol withdrawal symptoms and observed those symptoms became more marked the second day of appellant's incarceration. Appellant was dehydrated, his whole body was trembling, he had auditory hallucinations, his blood pressure was elevated, his pulse rate was rapid, and he was disoriented. A doctor was again notified, and he ordered appellant hospitalized.

I.

Appellant contends his trial attorneys were not effective. A postconviction petitioner claiming denial of ineffective assistance of counsel bears a heavy burden to overcome a strong presumption of counsel's competency. State v. Sims, 295 N.W.2d 420, 423 (Iowa 1980).

The standards governing claims of ineffective assistance of counsel are well established. The Iowa Supreme Court reiterated these standards:

> The petitioner bears the burden of proving by a preponderance of the evidence that his counsel was ineffective and must show that (1) counsel has failed to perform an essential duty, and (2) that prejudice resulted. See Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

> In examining trial counsel's performance, we require more than showing that trial strategy did not work or that another attorney would have taken different steps in the preparation and trial of the case. See Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). The United States Supreme Court has stated:
>
> > Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."
>
> Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984) (citations omitted).
>
> In deciding whether or not prejudice resulted, we have required a showing that the attorney's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted a denial of the accused person's due process right to a fair trial. See State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

State v. Heaton, 420 N.W.2d 429, 431 (Iowa 1988).

Appellant's defense was premised on a showing because of his intoxication he was unable to form the requisite intent to commit the murder. Part of the defense theory was that appellant suffered an alcoholic blackout when the crime was committed. Appellant also sought to show he acted in self-defense.

Appellant contends photographs taken at his booking should have been introduced in evidence. He says his attorneys were ineffective for not obtaining the photos and introducing them. Appellant assumes such photographs

existed and would have been beneficial to him. However, there is nothing in the record to show either that the photographs were taken or that introducing them into evidence would be beneficial to appellant's cause.

Additionally, there was considerable evidence that appellant showed signs of excessive drinking at his arrest and suffered withdrawal afterwards. Appellant has failed to show his trial attorneys were ineffective in this regard.

Appellant next contends his trial attorneys were ineffective in failing to move for change of venue. He also contends they should have polled or surveyed the community. The crime occurred in July 1981 and the trial was not held until January 1982. Trial counsel testified they considered filing a motion for change of venue, but decided against it for several reasons. First, they felt the passage of time had dissipated the media coverage of the case. Second, there were new jury panels in January 1981, which they considered to be favorable. Third, they were concerned a change of venue might result in having the trial in a small county, which they did not feel would be favorable to the defense. Fourth, the jury did not have much knowledge about appellant's case at the time of trial. We find appellant's trial attorneys advanced valid reasons supporting their decisions on this issue. They rendered reasonable professional assistance. See Miles, 344 N.W.2d at 234.

Appellant also contends his trial attorneys were ineffective in (1) not presenting witnesses to testify about his good character before his alcoholism, (2) failing to challenge the testimony of a State expert on the effects of alcoholism, and (3) subtly suggesting appellant fabricated testimony. We have carefully considered each claim and find each to be without merit.

II.

In addition,, appellant contends his conviction must be set aside because it was not supported by sufficient evidence. The State questions whether this issue may be raised in the present postconviction action, and the State also argues the evidence to support the conviction was overwhelming.

We agree with the State the evidence to support the conviction was overwhelming. We affirm.

AFFIRMED.